

# PUBLICATION

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## Arkansas Goes to Bat on Medical Marijuana: Hits Homerun for Employers

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**Across the country, employers and companies are dealing with efforts to decriminalize and legalize marijuana, both medicinal and recreational. In November 2016, by constitutional amendment, Arkansas legalized medical marijuana. Arkansas has since passed sweeping legislation targeting marijuana in the workplace, becoming one of the first states in the country to take an employer-focused approach to weed in the workplace.**

The November elections saw many states tackling both medical and recreational marijuana. Arkansas voters said yes to Initiative 6, the Arkansas Medical Cannabis Amendment of 2016. The MCA allows "qualifying patients" with certain medical conditions to buy cannabis from state-licensed dispensaries. The medical conditions include cancer, glaucoma, HIV/AIDS, Tourette's syndrome, Crohn's disease, PTSD, severe arthritis, Alzheimer's disease, severe nausea and several others. The MCA limits the number of state-licensed cannabis growing operations to between four and eight facilities, and the number of state-licensed dispensaries to between 20 and 40. By later vote, municipalities will decide whether to allow dispensaries in their counties or cities.

The MCA made it unlawful for an employer to discriminate against an "individual" based on the individual's past or present status as a "qualifying patient." This is not uncommon. While very few states protect use of medical marijuana, most all states with a medical marijuana program provide protections for participating in the program. In other words, simply being enrolled in or qualifying for a medical marijuana program is often protected. Using marijuana, however, is rarely protected by state law, and it remains absolutely illegal under federal law. For more on the current conflict between state law and federal law, check out [Weed in the Workplace: What You Need to Know](#).

Seeking to ease the burden on employers and clarify protections for employees, Arkansas recently amended the MCA. The changes were comprehensive and included:

- Clarifying that certifying an individual as a qualifying patient "is not a medical prescription." An important distinction for employers weighing potential ADA or FMLA issues.
- Limiting coverage to employers with nine or more employees. So employers with eight or less employees are not subject to the MCA's anti-discrimination provisions.
- With regard to the anti-discrimination provisions, they now apply only to an "applicant" or an "employee," not just any "individual."
- An employer cannot be sued under the MCA if acting in accordance with a drug-free workplace program or policy.
- An employer cannot be sued under the MCA if acting on a "good faith belief" that marijuana was possessed or used on the premises of the employer or during the hours of employment. "Good faith belief" is separately defined and examples are provided.
- An employer cannot be sued under the MCA if acting on a "good faith belief" that the employee or applicant was "under the influence" of marijuana while on the premises of the employer or during the hours of employment. "Under the influence" is separately defined and examples are provided.

- An employer cannot be sued under the MCA if excluding or removing an employee or applicant from a "safety sensitive position" based on the employer's good faith belief that he or she was engaged in the current use of marijuana. Generally, a positive drug test for marijuana cannot provide the sole basis for a good faith belief.
- A one-year statute of limitations has been set for any claim under the MCA.
- Damages under the MCA have been capped in accordance with the statutory caps in the Arkansas Civil Rights Act.
- Individuals (e.g., managers, supervisors, etc.) cannot be individually sued under the MCA.

For Arkansas employers, it is now key to identify "safety sensitive positions" and to have written job descriptions substantiating them. It is also important to include in a written job description – or to otherwise have a written policy identifying – the hours of employment. For all employers, Arkansas provides a good framework for updating written policies and implementing certain practices if you operate in a state with a medical (or recreational) marijuana program. If nothing else, regardless of where you operate, the recent focus on marijuana provides an excellent excuse for employers to review and update drug testing policies and practices.

If you have any questions or need any additional information, please contact the authors of this article or your regular Baker Donelson attorney.